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Supreme Court of the United States

OCTOBER TERM, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

—against—

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENTS GUARDIANS OF THE PROPERTY OF ALLAN P. KIRBY AND RESPONDENT CHARLES T. IRELAND, JR. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners, as stockholders suing in the right of Alleghany Corporation ("Alleghany"), seek to appeal here from a denial by the United States Court of Appeals below of three separate attempts[1] by petitioners to relitigate for the

[1] Petitioners randomly discuss events from different ones of those proceedings as though describing the same proceeding, when in fact, for example, the discussion at pp. 10-11 of the petition refers to Docket No. 28397, while the continued discussion at pp. 12-14 of the petition refers to earlier events in Docket No. 31115.

third, fourth and fifth times the propriety of an exchange of stock of Investors Diversified Services, Inc. ("IDS") owned by Alleghany for stock of Alleghany owned by Allan P. Kirby ("Kirby") in 1949-1950. The propriety of that transaction was originally adjudicated between the same parties in the Supreme Court of New York, *Zenn* v. *Anzalone*, S. Ct., N. Y. Co., 7244/1954. Thereafter it was put in issue a second time in the Federal courts below and in this Court in *Alleghany Corp.* v. *Kirby*, 218 F. Supp. 164 (S. D. N. Y. 1963), *aff'd*, 333 F. 2d 327 (2d Cir. 1964), *aff'd on rehearing en banc by an equally divided court*, 340 F. 2d 311 (1965), *cert. dismissed as improvidently granted after oral argument sub nom. Holt* v. *Kirby*, 384 U. S. 28 (1966).

The History of This Litigation and the Proceedings Below

The original (*"Zenn* (State)") litigation in the New York State court of the issue of the propriety of the 1949-1950 transaction between the corporation and its officers was a consolidation of ten shareholder actions, eight of which were commenced in the spring of 1954, brought representatively and derivatively on behalf of Alleghany against Kirby and eighteen other defendants[2] (Pet. Appx. 2134).[3] After five years of litigation that action[4] was settled

[2] At about the same time that Zenn (State) was commenced, a similar derivative action entitled Zenn v. Anzalone (hereinafter "Federal Zenn") was commenced in the United States District Court for the Southern District of New York. After some initial depositions, Federal Zenn remained pending and unprosecuted for twelve years and was dismissed by the District Court on August 9, 1966 for lack of prosecution (Pet. Appx. 2134).

[3] References in this brief to the opinions of the Court of Appeals and of the District Court in Appeal Docket No. 31342 hereinbelow

in consideration of the payment of $3 million plus return of control of IDS to Alleghany. The adequacy of the settlement was investigated at length in hearings before a Referee, Robert J. Fitzsimmons ("Fitzsimmons"), appointed by the New York Supreme Court, and, as later supplemented, was thereafter judicially approved by that court (17 Misc. 2d 897, 191 N. Y. S. 2d 840 (S. Ct., N. Y. Co. 1959); Pet. Appx. 2134-39). All Alleghany shareholders were notified of the proposed terms of the settlement as of the date of its proposal in 1955 and were advised of their right to attend a hearing with respect to it. As the District Court in *Smith* v. *Fitzsimmons,* Docket No. 31342 below, found, "none of the plaintiffs [herein] were stockholders of Alleghany in 1955," and hence "their claim that they received no notice of the settlement finally approved in 1959 . . . is lacking in merit" (Pet. Appx. 70a).

The hearings conducted by the Referee resulted in the marking of 480 exhibits and the production of 4600 pages

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are made to the appendices in the petition, thus: *e.g.*, "Pet. Appx. 2134; Pet. Appx. 75a," etc. References to the decisions of Judge Weinfeld in Appeal Docket No. 31115 are made to the appendices in this brief, thus: "A1 *infra*; B1 *infra*," etc. References to the opinion of the District Court in Alleghany Corp. v. Kirby are made to the official report of that opinion in 218 F. Supp. References to the records on appeal hereinbelow are made to the consecutively numbered pages therein, thus—"Rec. in 31115 at p. 10," etc.

[4] The settlement covered both the Zenn (State) action and a similar derivative action entitled Breswick v. Briggs ("Breswick"), then pending in the United States District Court for the Southern District of New York. The Federal Breswick action included many of the same claims against the same defendants as were contained in Zenn (State), but did not include the claim on the 1949-1950 IDS stock transaction sought to be reopened herein (Pet. Appx. 2134-35, 2138). Robert J. Fitzsimmons, who had been appointed Referee in Zenn (State), was also appointed Special Master in Breswick for the purpose of examining into the adequacy of the settlement negotiations as they affected the Breswick plaintiffs (Pet. Appx. 2135-36).

of testimony taken from 18 witnesses, seven of whom were proponents and 11 objectants to the proposed settlement (218 F. Supp. at 171). On December 28 and 29, 1959 the New York Supreme Court approved and confirmed the stipulations of settlement that finally had been agreed upon between all the parties, and subsequent thereto $3 million was paid by Kirby and certain other defendants to Alleghany, control of IDS was returned to Alleghany, general releases were delivered to all defendants and the action was dismissed (Pet. Appx. 2138-39).

None of the petitioners herein was a party to that litigation. Indeed, as found by the District Court in No. 31342 below, petitioners Smith and Wiener were not even stockholders at the time the settlement was approved (Pet. Appx. 70a). Petitioner Randolph Phillips, though also not a party, was directly involved as a prime mover in the *Zenn* litigation. He was a "consultant" both to the plaintiffs in *Breswick* (see footnote 4, *supra*) and to an Alleghany stockholder who intervened as an objectant in the settlement hearings before the Referee in *Zenn* (State) (218 F. Supp. at 171). The final settlement agreement between Alleghany and Kirby in which Phillips (and his objectant-client) acquiesced was the result of Phillips' own efforts and negotiations (173 F. Supp. at 173-75, 177-78). Unquestionably he had "a very important position in the litigation," so much so that "his reaction to a settlement proposal might in fact prove decisive" (218 F. Supp. at 175).

The second attempt to litigate the same issue between Alleghany and Kirby began on September 8, 1960, when the Murchison brothers—who had been co-defendants and co-

settlors with Kirby in the prior litigation and who thereafter had a falling out with him—brought a derivative suit on behalf of Alleghany against Kirby and others to set aside the *Zenn* settlement (upon the Murchisons' gaining control of Alleghany the following year, they caused Alleghany to be substituted as party-plaintiff in that lawsuit, captioned *Alleghany* v. *Kirby*) and to cause Alleghany to relitigate the 1949-1950 transaction as to Kirby (Pet. Appx. 2140). In that action it was asserted that the settlement of Kirby's liability in *Zenn* (State) had been procured by fraud in the form of an alleged secret and corrupt agreement between Kirby and Randolph Phillips whereby Phillips, the motive force behind the litigation, was allegedly bribed to agree to the settlement, and the alleged failure by Kirby to adduce facts at the Referee's hearings held in *Zenn* (State) bearing upon the 1950 IDS exchange transaction (218 F. Supp. at 167; Pet. Appx. 2141).

Alleghany v. *Kirby* was tried in the District Court for the Southern District of New York from April 1, 1963 to April 19, 1963. In the course of trial, 2,474 pages of testimony were taken and 222 exhibits admitted in evidence (218 F. Supp. at 169). Petitioner Phillips, then a co-defendant with Kirby, vigorously defended the bona fides of the settlement of the 1949-50 transaction (Trial transcript pp. 1178-79, 2424-25 in *Alleghany* v. *Kirby,* S. D. N. Y./60 Civ. 3511). At the conclusion of a three-week trial, the trial court held that "plaintiff completely and utterly failed to establish" its case (218 F. Supp. at 187), found the settlement free from fraud, and dismissed the complaint. On appeal, the Court of Appeals for the Second Circuit affirmed 2-1, and again on rehearing (which by that time had been sought by a new Kirby management of Alleghany),

affirmed 4-4. Alleghany thereupon directed its counsel to discontinue any further efforts to seek review (Pet. Appx. 2142-43).

However, counsel who had theretofore represented the anti-Kirby management of Alleghany thereupon sought and obtained a writ of certiorari from this Court to review the charge of fraud in the procurement of the *Zenn* judgment and settlement, in the name of two newly-arrived stockholders of Alleghany *sub nom. Holt* v. *Kirby*. Their petition represented that various far-flung issues of national importance were involved, and this Court granted its writ (Pet. Appx. 2143-44). Briefs containing in excess of 350 pages and an appendix consisting of 2,392 printed pages were submitted to this Court and oral argument had thereon (Oct. Term 1965, Docket No. 132). This Court, voting 4-3, then dismissed its writ of certiorari as improvidently granted (384 U. S. 28).

In the interim between the Court of Appeals' decision in *Alleghany* v. *Kirby* and this Court's consideration on review of that decision *sub nom. Holt* v. *Kirby*, petitioner Phillips in 1964 submitted his affidavit to the New York Supreme Court in support of an application for attorneys' fees in *Zenn* (State), award of which had been postponed pending disposition of the *Alleghany* v. *Kirby* litigation. In that affidavit Phillips again praised the settlement. The court on May 7, 1965 awarded total fees of more than $1.8 million, from which Phillips received $392,000 plus expenses (Affid. of J. E. Tobin dtd 2/20/68, p. 17, in Ct. App. Docket No. 28397 below).

As soon as fees had been awarded, Phillips attacked the same settlement. In *Holt* v. *Kirby*, he requested and was

granted leave to file a brief amicus curiae with this Court, in which he attacked the settlement on various jurisdictional grounds. After this Court dismissed its writ in that case, Phillips reappeared as a "consultant" to the newly-arrived "absent" stockholder-plaintiffs Smith and Wiener hereinbelow in Docket No. 31342, *Smith* v. *Fitzsimmons*, one of the three proceedings the results of which petitioners here seek to appeal (Pet. Appx. 70a). By their complaint therein, filed in the District Court on June 8, 1966, eight days after this Court's denial of a petition for rehearing in *Holt* v. *Kirby*, Phillips' "consultees" once again charged that the *Zenn* settlement and judgment had been procured by fraud, with the variation that this time the Referee, rather than Phillips, was alleged to be the corrupt participant with Kirby in a fraudulent scheme. By its allegations the complaint attacked the attorneys as well as the parties represented in *Zenn* (Pet. Appx. 2148-49, 71a-75a; Rec. in 31342 at pp. 1-25).

Defendants in *Smith* v. *Fitzsimmons* moved for summary judgment and submitted an affidavit of unequivocal denial of each of the unsupported charges of the complaint from the Supreme Court Referee who had been maligned in the complaint (Rec. in 31342 at pp. 255-57). The plaintiffs in their opposing papers did not controvert any of these sworn averments, nor did they attempt to sustain any of their complaint's allegations by any kind of sworn statement or evidence of any kind (Pet. Appx. 2153-54, 69a, 76a). The District Court dismissed the complaint and in its order of March 1, 1967 specifically directed that "Further attempts to reopen the litigation may subject plaintiffs' counsel personally to the costs thereof as provided in 28 U. S. C. § 1927" (Rec. in 31342 at pp. 587-88).

Meanwhile, on October 21, 1966, Phillips' same "consultees" had already commenced their second litigation (Docket No. 31115 herein) by way of a motion in the same District Court for leave to intervene in the adjudicated case of *Alleghany* v. *Kirby* for the purpose of having the judgment in that case vacated for fraud on the ground that the Court of Appeals had lacked jurisdiction to consider the appeals in that case in 1963 and 1964 because of Kirby's coming back into control of Alleghany after the appeal was argued in 1963.[5] Petitioners claimed that that issue had been "concealed" by all parties in that case (Pet. Appx. 2145). Since the facts they relied on had in fact been specifically presented to the Court of Appeals by all sides when it considered that appeal (Pet. Appx. 2143; Rec. in 31115 at pp. 9-23), Judge Weinfeld dismissed that motion as being so devoid of merit as to warrant no discussion (A2-A3 *infra*). They then moved to vacate his decision on the ground that Judge Weinfeld, too, had plainly lacked jurisdiction, and that motion was denied (B1 *infra*). Their unsuccessful appeal from that decision comprises appeal Docket No. 31115, from the result in which they also seek to appeal here.

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[5] In April 1965 the petitioners Holt and McMahon made the same claim for leave to intervene in the same case as "absent parties" whose interests had not been adequately represented therein, at a time when the case was still *sub judice* and the corporation had declined to petition for writ of certiorari. The District Court and the Court of Appeals rejected their application as untimely and without merit, finding that the interests of the corporation and its stockholders had been adequately represented. 344 F. 2d 571 (2d Cir. 1965). This Court, after hearing argument thereon, dismissed their petition for writ of certiorari on that issue as improvidently granted, *sub nom. Holt* v. *Alleghany*, Oct. Term 1965 (Docket No. 131).

After filing appeals from both that decision and the decision in *Smith* v. *Fitzsimmons*, the same parties, this time openly joined by Phillips, moved de novo in the Court of Appeals to reopen its judgment in *Alleghany* v. *Kirby*, No. 28397, on the ground of fraud allegedly committed on it, reasserting the same charges they had made in the District Court in *Smith* v. *Fitzsimmons*, and for the first time offering as "evidence" certain "notes" allegedly possessed by their "consultant," Randolph Phillips, throughout the course of the aforedescribed series of proceedings, and a charge that the Referee's Report in *Zenn* (State) had not been prepared by the Referee but instead by Thomas F. Daly, Esq., a senior partner in the New York law firm of Lord Day & Lord, who had represented Kirby at one point in the *Zenn* (State) case (Pet. Appx. 2154-59).

In the Court of Appeals defendants submitted unequivocal denials from each of the attorneys, including Mr. Daly and others slurred by Phillips (Pet. Appx. 2156-59). Again the petitioners offered no substantiation for their assertions, other than (1) Phillips' statement that an unnamed attorney "who requests that his identity not be disclosed" was allegedly told by the court reporter who transcribed the Referee's Report that the report had been written by Thomas F. Daly (which the same reporter unequivocally denied under oath) and (2) certain handwritten memoranda allegedly written by Phillips in early June 1960 while *Zenn* v. *Anzalone* was still *sub judice*, long before the action to set aside the settlement in *Alleghany* v. *Kirby* had even been commenced, and which Phillips allegedly kept in his possession for seven years prior to submitting them hereinbelow (*ibid.*).

The Court of Appeals below, reviewing this "evidence" de novo and hearing argument thereon by Phillips, found, first, that the same issues had already been litigated in *Smith* v. *Fitzsimmons*, that all of the same "evidence" had been then available, and that there was no ground to reopen issues already fully litigated (Pet. Appx. 2157-58); and, second, that all of the "evidence" of "fraud" offered by petitioners herein was insubstantial and uncorroborated (Pet. Appx. 2155-59). By a unanimous decision the Appeals Court panel (two of whose three members—Friendly and Smith, JJ.—had dissented from that court's earlier affirmance of the dismissal in *Alleghany* v. *Kirby*) affirmed the District Court's dismissals below and denied the new application made to it to reopen *Alleghany* v. *Kirby* (Pet. Appx. 2133).

Petitioners' "Questions" and the Question Actually Presented

Petitioners have filled six pages with "questions" which they contend are raised by their petition. In fact each of those so-called questions is a will-o'-the-wisp premised either on petitioners' failure to advise the Court that the jurisdictional errors they attribute to the courts below (in questions 1 and 2) consist of those courts' having entertained the very proceedings brought by petitioners themselves, or on matters which have already been set to rest between the parties in previous litigation (questions 3 and 4), or on an issue (question 5) wholly mooted by the Court of Appeals' having considered petitioners' evidence de novo in No. 28397 (see Pet. Appx. 2147-59), or on misleading hypotheses which are not the facts herein (questions 5, 6,

7, 8 and 9—see the findings of the courts hereinbelow, Pet. Appx. 2131-59, 68a-77a; A1-A3, B1 *infra*).

As noted hereinabove, both the complaint in No. 31342 and the motion in No. 31115 were brought in the District Court below by petitioners themselves. After entry of a decision adverse to them in No. 31115 they moved to vacate for lack of jurisdiction of the same court to have disposed of their motion. That motion, too, was denied (see B1 *infra*). They then noticed appeals to the Court of Appeals in Nos. 31342 and 31115, and after losing on both appeals moved the Court of Appeals to vacate its judgment for its own alleged lack of jurisdiction to have heard their appeals, which motion that court also denied (see Pet. Appx. 78a). Thereafter they filed their petition herein, by questions 1 and 2 of which they argue that they should not be denied still a third chance to litigate the same questions because the courts below erred in considering the proceedings which they themselves had brought.

Questions 3 and 4 refer to Smith and Wiener's renewed attempt in No. 31115 to relitigate on behalf of Alleghany the identical question of subject matter jurisdiction of the Court of Appeals over *Alleghany* v. *Kirby* that was specifically presented to and passed on by that court previously in that litigation (see A2 *infra;* see Rec. in 31115 at pp. 9-22; see Pet. Appx. 2143).

Questions 5 and 6 misleadingly pretend that petitioners were somehow prevented from presenting their "evidence" in the District Court. In fact, petitioners themselves moved for summary judgment in No. 31342 in the District Court; and after defendants moved for dismissal and summary judgment of No. 31342 in the District Court on the basis

of affidavits of unequivocal denial of each of petitioners' uncorroborated charges from each individual attacked by petitioners, neither petitioners nor their counsel nor Phillips offered any factual rebuttal to substantiate their claims, by affidavit or otherwise, and the District Court accordingly entered judgment against them. After noticing an appeal therefrom, petitioners then also moved de novo in the Court of Appeals in No. 28397 to reopen *Alleghany* v. *Kirby* on the basis of the same charges. This time they offered Phillips' memoranda as their evidence. The Court of Appeals held that petitioners were not entitled to an endless profusion of litigations by electing first to withhold their "evidence" in the District Court and, after they failed there, starting again de novo on a claim that the District Court had no jurisdiction to have considered their cause (see Pet. Appx. 2157-58, 2159, 76a).

Petitioners' remaining "questions" simply pose issues of fact which both courts below (the Court of Appeals taking evidence de novo) determined in all respects against petitioners (see Pet. Appx. 2148-59).

In fact the only issues presented on this petition are whether each and every stockholder of a corporation which is a party to a judgment, by calling himself an "absent party" to that judgment, is entitled separately to relitigate for the corporation on his own theory the same issues that have already been adjudicated as to the corporation; and whether this Court should review the findings of fact of the District Court and the Court of Appeals below that petitioners' charges were completely unsubstantiated. We submit that such issues do not deserve serious consideration by this Court.

Argument

The petition is replete with oft-repeated assertions of "ex parte" and "secret" meetings, "bargaining" between the Referee and Alleghany's Vice-President in *Zenn*, and much more in a similar vein. Suffice it here to say that as demonstrated by the thorough findings of the Court of Appeals below (Pet. Appx. 2132-59), the "facts" presented in the petition consist entirely of the colorful hypotheses unreservedly indulged in by petitioners in their complaint below, all of which both the District Court and the Court of Appeals (making findings de novo) found to be unsubstantiated (see esp. Pet. Appx. 2156-59). To elaborate on petitioners' misrepresentations here would serve no useful purpose, and we instead refer the Court to the detailed findings of the Court of Appeals and the District Court below, which are appended to the petition for certiorari and to this brief.

The instant litigation is but the latest in a series of attempts by a disgruntled and discharged former Alleghany employee, Randolph Phillips, to vent his spleen on his former employers. Phillips has been active in promoting this litigation since the inception of its earliest predecessors in 1954 and 1955. He promoted and defended the *Zenn* settlement in 1959 and 1960, argued for fee awards based on its value in 1964, and then in 1966 proceeded to attack that settlement as improperly procured, on the basis of so-called facts which he claims he knew back in 1960.*

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* The other petitioners herein were procured as plaintiffs below through the efforts of Phillips in concert with the wife of their attorney Bobrick, Elizabeth Most, herself originally a plaintiff below, who solicited other stockholders to join her and Mr. Phillips in bringing a lawsuit through her husband (Pet. Appx. 70a-71a).

In fact, Phillips has practically made a vocation of suing Alleghany and its subsidiaries and their officers so that, in the words of its President, Charles T. Ireland, Jr., in testimony in *Alleghany* v. *Kirby*, Alleghany became "a retainership for law firms" (p. 175 of trial transcript, 60 Civ. 3511, S. D. N. Y.). *E.g.*, in addition to *Zenn* v. *Anzalone*, *Breswick* v. *Briggs*, and *Holt* v. *Kirby*, see *Willheim* v. *Murchison*, 203 F. Supp. 478 (S. D. N. Y.), *aff'd*, 303 F. 2d 276 (2d Cir. 1962); *Phillips* v. *Murchison*, 194 F. Supp. 620 (S. D. N. Y. 1961); *Rosen* v. *Alleghany*, 133 F. Supp. 858 (S. D. N. Y. 1955); *Phillips* v. *Alleghany*, Sup. Ct., N. Y. Co. (12788/1965); *Phillips* v. *Bradford*, 228 F. Supp. 397 (S. D. N. Y. 1964); *Ackert* v. *Bryan*, U. S. C. A. (2d Cir., June 21, 1963). His efforts in these actions have variously been described as a "bizarre proceeding" (Ryan, C. J., in *Phillips* v. *Bradford*, 228 F. Supp. at 398) and as a "cavalier and outrageous use of the federal courts" (Kaufman, J. in *Ackert* v. *Bryan*).

We respectfully submit that—to paraphrase Mr. Justice Holmes—three generations of lawsuits are enough. There is no justification whatsoever for petitioners' substanceless efforts to resurrect this twice-laid-to-rest litigation, and still less for their persistent misuse of the legal process in aid of such efforts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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